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~~85-2056~~

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THEODORE YANOPOULOS,

Petitioner,

v.

DEPARTMENT OF THE NAVY and
MERIT SYSTEMS PROTECTION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

Petitioner was removed by the Department of the Navy, Naval Sea Systems Command, from his position of Electronics Engineer for unsatisfactory performance. He appealed this removal to the Merit Systems Protection Board. The Merit Systems Protection Board thereafter held an oral hearing at which petitioner appeared pro se and at which the Department of the Navy, Naval Sea Systems Command appeared with counsel. Petitioner was, among other things, precluded at the hearing from presenting the oral testimony of two individuals whom he wished to call as witnesses and the Department of the Navy, Naval Sea Systems Command was permitted to endeavor to prove its case through the use of extensive leading questions.

The questions presented are:

1. Whether the Merit System Protection Board's form orders dealing with the statutory right of Federal employees to representation before that agency sufficiently advise such employees of the nature of the hearing held by that agency or of the advantages of having counsel (or other representative) at such a hearing such that the employee can make a knowing and competent determination whether to obtain a representative or whether to waive his or her statutory right to representation.

2. Whether the United States Court of Appeals for the Federal Circuit erred in failing to reverse and remand the final Order of the Merit Systems Protection Board where petitioner had been deprived of the full and fair hearing to which he was

entitled before that agency.

Note: The case caption contains the names of all the parties to the proceeding in the United States Court of Appeals for the Federal Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Petitioner Theodore Yanopoulos prays that a Writ of Certiorari issue to review the opinion and the judgment of the United States Court of Appeals for the Federal Circuit entered on January 28, 1986. A petition for

rehearing, which included a suggestion for rehearing in banc, was timely filed by petitioner to the United States Court of Appeals for the Federal Circuit. The Court of Appeals for the Federal Circuit, following consideration of the petition for rehearing on the merits, denied the petition for rehearing (and declined the suggestion for rehearing in banc) in an Order entered on March 19, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit as to which review is sought herein was entered on January 28, 1986. The Order of the Court of Appeals for the Federal Circuit denying petitioner's petition for rehearing (and declining petitioner's suggestion for rehearing in banc) was entered on

March 19, 1986. The opinion of the Court of Appeals for the Federal Circuit affirmed the opinion (contained in a document entitled Order) entered by the Merit Systems Protection Board on April 30, 1985, which in turn denied a petition for review filed with that agency by the petitioner and made the initial decision of MSPB Presiding Official William Jenkins (contained in his initial decision and in his subsequently issued supplemental initial decision) the final decision of the MSPB. All of the aforesaid Orders and Decisions are included in the Appendix hereto, in a separate volume.

JURISDICTION

The opinion of the Court of Appeals for the Federal Circuit was entered on January 28, 1986. A timely petition for rehearing was denied on March 19, 1986. This petition for

a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

PROVISIONS OF STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 7701(a):

Appellate Procedures

An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation. An appellant shall have the right -

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

5 CFR 1201.41:

Presiding Officials

(a) Exercise of Authority. Presiding officials shall conduct fair and impartial hearings and take all necessary action to avoid delay in the disposition of all proceedings. They shall have all powers necessary to that end unless otherwise limited by law, including but not limited to, the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas in accordance with Sec. 1201.81;

(3) Rule upon offers of proof and receive relevant evidence;

(4) Rule upon the institution of discovery procedures as appropriate under Sec. 1201.73;

(5) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum and exclude from the hearing any disruptive persons;

(6) Exclude from the hearing any witness whose later testimony might be colored by testimony of other witnesses or any persons whose presence might have a chilling effect on testifying witness;

(7) Rule on all motions, witness and exhibit lists and proposed findings;

(8)Require the filing of memoranda of law and the presentation of oral argument with respect to any question of law;

(9) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material and nonrepetitious;

(10) Impose sanctions as provided under Sec. 1201.43 of this part;

(11) Hold prehearing conferences for the settlement and simplification of issues; and

(12) File initial decisions.

STATEMENT OF THE CASE

Petitioner Theodore Yanopoulos (hereafter "Petitioner" or "Yanopoulos") was removed from his position of Electronics Engineer with the Department of the Navy, Naval Sea Systems Command (hereafter "NAVSEA") for alleged unsatisfactory performance effective October 1, 1982. He had held that position since July of 1951.

Using the appeal form supplied by the MSPB, which form is to be used for all appeals filed by Federal employees appealing adverse actions taken by their Federal employers against them, petitioner timely filed an appeal to the MSPB Washington Regional Office from the action of NAVSEA. Subsequently, on October 12, 1982 an Initial Order acknowledging the receipt of the appeal was entered by the MSPB Washington Regional Office's Acting Regional Director. Thereafter, on November 1, 1982, an Order for Hearing was entered by Stephanie Marks, the MSPB Presiding Official then assigned to hear the case, setting oral hearing in the case to be held on December 14, 1982. The Initial Order and the Order for Hearing, like the aforementioned appeal form, employed by the MSPB in Yanopoulos' case are form documents sent

out by the MSPB in all unsatisfactory performance cases which it handles; only names, places, and dates peculiar to the particular case are changed from case to case. For the convenience of the Court, the Initial Order and the Order for Hearing are included in the Appendix hereto.

The aforementioned three documents, the appeal form, the Initial Order, and the Order for Hearing, were the only documents which would in any way have advised Yanopoulos of the nature of the oral hearing scheduled in his case or his right to representation at the hearing prior to his appearance at that hearing.

As to the right to have counsel (or another representative) and the nature of the MSPB hearing, the Appeal form solely states the following in its questions 26, 27, and 28:

"26. You have a right to a hearing on this appeal. If you do not want a hearing, the Board will make its decision on the basis of the documents you and the agency submit. Do you want a hearing? . . .

27. You have the right to designate someone to represent you on this appeal if he/she agrees to do so. This person does not have to be an attorney. The agency has a right to challenge your choice of a representative if there is a conflict of interest or position. You may change your designation of a representative at a later date, if you desire, but must notify the Board promptly of any change.

28. You may be permitted to call witnesses at a hearing upon the approval of the Presiding Official. If you intend to do so, provide their names and a brief statement of their relationship to the case. You will be permitted to request other witnesses later if you do not list them now." (P.A. 03).[1]

[1] The abbreviation P.A. is used herein to refer to the Petitioner's Appendix contained in the back of the Opening Brief Petitioner filed with the Court of Appeals for the Federal Circuit below. The record shall be referred to herein by reference to pages of that Appendix.

The form Initial Order solely states as to the right to have counsel (or another representative) in its paragraph number 3 as follows:

> "Parties shall file with the Board a Designation of Representative form (enclosed) if they wish to be represented and have not previously designated a representative. Parties are required to notify the Board and each other of any change in representative during any stage of the proceedings. If there is a change in representative, the party shall strike the old representative from the service list and begin to make service on the new representative."

The sole statement contained in the Initial Order as to the nature of the MSPB hearing is in its paragraph number 6 as follows:

> "If a hearing is requested, it will be conducted approximately two to six weeks after the agency files its response to the petition for appeal as ordered in paragraph 2. At the time the hearing is scheduled the parties will receive information on how to arrange for presence of witnesses at the hearing. If a hearing has not already been requested the parties

> are provided 15 days from the date of this order to file a request. If no request for a hearing is received within the time limit, the hearing will be considered waived and the Presiding Official will adjudicate the case after providing the parties with the opportunity to file written submissions."

The third document, the form Order for Hearing, says nothing about the right to have counsel (or another representative) and provides no substantive information as to the nature of the hearing although it sets deadlines for filing lists of witnesses intended to be called, serving objections to witnesses of the other party, and for serving copies of hearing exhibits on the opposing party.

On November 30, 1982, 14 days before the scheduled hearing date, Yanopoulos sent a letter to the MSPB's Presiding Official then set to hear the case in which he indicated that he

would "secure a counsel to conduct discovery" and requested that the hearing date be changed to January 14, 1983 (P.A. 24). The Presiding Official then set to hear the case, Stephanie Marks, responded to this request and another request by NAVSEA for a continuance of the hearing date by entering an Order dated December 3, 1982 continuing the hearing date for a mere period of six days, until December 20, 1982. (P.A. 26). The hearing was held on December 20, 1982 with Yanopoulos appearing pro se.

As demonstrated by his sending of the aforementioned letter on November 30, 1982, Yanopoulos was equivocal and indecisive as to whether he wanted an attorney up to the date of the hearing held by the MSPB. He was also unaware of the nature of the MSPB hearing at the time his hearing began. In his

Affidavit dated September 4, 1985 which was filed with the Court of Appeals for the Federal Circuit pursuant to leave granted by that Court, Yanopoulos stated as pertinent to these matters:

> "5. I did not have any idea of how the hearing would be conducted or what procedures would be followed at the hearing until I appeared at the hearing. I never followed through in obtaining an attorney; I had the impression until the time the hearing actually began that I could properly represent myself at the hearing.
>
> 6. Once the hearing began, I realized that I needed an attorney very badly. I was, among other things, confused and had no understanding of the procedures to be followed or any idea how to conduct the hearing."

The oral hearing was held by the MSPB on December 20, 1982 before Presiding Official William Jenkins. The Presiding Official did not advise Yanopoulos of his right to counsel or even ask him whether he was waiving his statutory right to representation.

At the oral hearing, Yanopoulos, as the transcript of the hearing reflects, was thoroughly confused as to evidentiary matters, as to procedures, as to the involved law, and as to the nature of the hearing and how it was to be conducted. For example, he did not know how to make an opening statement (P.A. 33-35), interrupted the testimony of NAVSEA witnesses with testimony of his own (P.A. 38), and did not understand that it was necessary to ask questions rather than make statements on cross-examination (P.A. 40-43).

Pursuant to the MSPB's Order for Hearing dated November 1, 1982, both NAVSEA and Yanopoulos were to file with the Presiding Official prior to the hearing a list of the names of the witnesses they intended to call at the hearing. NAVSEA filed a Notice

of Witnesses listing eight witnesses it intended to call, all of whom were then NAVSEA employees (P.A. 22-23). Yanopoulos on December 7, 1982, sent a letter to the Presiding Official stating that "I wish to have available for me a presently unknown number of witnesses called by my Agency [NAVSEA]", thereby indicating that he wished to be able to call to the witness stand any or all of the witnesses designated by NAVSEA in its list of witnesses (P.A. 29).

NAVSEA, however, only produced at the hearing three of the eight employees it had designated as witnesses in its list of witnesses. The Presiding Official acknowledged that Yanopoulos desired to present the testimony of two of the other five employees who had not been produced, Simon Kfoury and Donald Cross, on matters which were

relevant. He refused, however, to require the appearance of Mr. Kfoury, who was then in California as he (the presiding official) had not been "previously requested to make him available today" and as requiring his appearance would delay the hearing. The presiding official further refused to require the appearance of Mr. Cross for oral testimony but instead requested NAVSEA's counsel to have Mr. Cross submit an affidavit addressing the questions raised by Yanopoulos. NAVSEA subsequently submitted a two page Affidavit executed by Donald Cross.

Numerous leading questions were asked by counsel for NAVSEA of its own witnesses in the presentation of its direct case, concerning such matters as whether Yanopoulos was made aware that his job performance was considered to be deficient, whether Yanopoulos

had been made aware of his performance standards prior to his having been advised that his performance was unacceptable under those standards, whether military guides and checklists were available to Yanopoulos as references in performing his duties, alleged specific instances of unacceptable performance on Yanopoulos' part, and matters relating to the advance written notice of unacceptable performance provided by Yanopoulos' supervisor to Yanopoulos. (P.A. 48, 53-55, 57-63). Yanopoulos did not object to such leading questions nor did the Presiding Official in any way attempt to stop or dissuade NAVSEA's counsel from asking such leading questions on direct examination.

Presiding Official Jenkins thereafter entered an Initial Decision on February 17, 1983 sustaining

NAVSEA's removal of petitioner from his position of Electronics Engineer.

Yanopoulos thereupon retained an attorney to represent him before the MSPB. Yanopoulos through counsel requested a new hearing by the MSPB in a Petition for Review filed with that agency on March 24, 1983 and in a letter-motion filed with that agency dated November 8, 1984 on the basis that he had not received a full and fair hearing and had been severely prejudiced by his lack of counsel and by the failure of the Presiding Official to see to it that a fair hearing was held in his case. The MSPB, although it on its own motion reopened the case as to a matter which was not placed in evidence at the hearing and which had only become pertinent as a result of a decision issued after the close of the hearing,

denied such requests for a new hearing and ultimately affirmed the Presiding Official and made his initial decision the final decision of the agency.

Yanopoulos thereupon filed an appeal from the Order of the MSPB to the Court of Appeals for the Federal Circuit pursuant to the provisions of 5 U.S.C. 7703.

The Court of Appeals for the Federal Circuit in a seven page per curiam decision affirmed the decision of the MSPB. The Court of Appeals found (1) that the MSPB adequately informed Yanopoulos of his right to representation, (2) that Yanopoulos knew of his right to representation in any event, (3) that the MSPB adequately informed Yanopoulos of the nature of the proceedings, (4) that the failure to obtain the oral testimony of certain witnesses Yanopoulos desired to

call to the witness stand "was petitioner's own fault", and (5) that petitioner failed to sufficiently show that he was prejudiced by the use of leading questions on direct examination by counsel for NAVSEA. Of particular importance, the Court found as follows:

> "More importantly, however, we find it incredible that this petitioner would not know of the nature of an MSPB hearing. He had been a Federal employee for 31 years and had obtained the level of a GS-12. The agency had recently removed him from the Federal service through a very lengthy and formal process that must have impressed upon petitioner the nature of this action. In light of his tenure as a Federal employee, the level of intelligence presumed from his rank, and the formality of the process used to remove him from the Federal service, petitioner must have known the nature of the MSPB's adjudication of his appeal."

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS SERIOUSLY ERRED CONCERNING NOTICE OF THE RIGHT TO REPRESENTATION BEFORE THE MSPB, AND THIS MATTER OF NOTICE AFFECTS NUMEROUS FEDERAL EMPLOYEES

The Court of Appeals for the Federal Circuit, in its opinion below, decided a precedent setting question of exceptional importance. That issue is whether the MSPB's form orders dealing with the statutory right of Federal employees to representation before that agency sufficiently advise such employees of the nature of the MSPB hearing or of the advantages of having counsel (or other representative) at such a hearing such that the employee can make a knowing and competent determination whether to obtain a representative or whether to waive his or her statutory right to

representation. The same form orders sent to Yanopoulos by the MSPB, and the same Appeal form, are used by the MSPB in all unsatisfactory performance cases.

As a result, the issue raised herein affects not just this case but many other cases as well. At the oral argument held by the Court of Appeals for the Federal Circuit below, Judge Friedman of that Court stated that he was loath to reverse the MSPB's decision concerning Yanopoulos on the basis of defective notice as to find the MSPB's form Orders defective in this regard would have the effect of invalidating numerous MSPB decisions and would affect the cases of a great number of Federal employees. And this is precisely why this Court should grant the sought writ herein. Considering that the Court of Appeals for the

Federal Circuit, pursuant to the terms of 5 U.S.C. 7703, is the only Court of Appeals to which an aggrieved federal employee can appeal a decision of the MSPB, it is particularly important that this matter of significance be considered by this Court herein. Otherwise, this significant matter will in all likelihood, due to the attitude of the Court of Appeals for the Federal Circuit articulated by Judge Friedman, never receive the level of appellate scrutiny which is warranted.

As previously shown, the right of a Federal employee to be represented in hearings before the MSPB is provided for in 5 U.S.C. 7701 (a)(2). That section states that an individual appealing from an adverse action taken by his employer agency against him "shall have the right to be represented

by an attorney or other representative."

The Courts have consistently held that a party having a statutory right to counsel at an administrative hearing must knowingly waive counsel or his lack of representation is itself cause for remand for a new hearing. Dobrowolsky v. Califano, 606 F. 2d 403, 407 (3rd Cir. 1979); Thomas v. Schweiker, 573 F. Supp. 327, 329-330 (W.D. Tex. 1985); Clark v. Harris, 652 F. 2d 399, 402-404 (5th Cir. 1981). See also Smith v. Secretary of Health, Education and Welfare, 587 F. 2d 857 (7th Cir. 1978), in which a social security disability case was reversed and remanded for a new hearing and in which the court pointedly observed at 859-860 that the appellant had been given only a minimal explanation of her right to

counsel and did not understand the role a lawyer would play in the proceeding.

It is fundamental that a party cannot knowingly waive his right to counsel or other representative unless he is made aware of the nature of the hearing he is going into. For example, in Partible v. Immigration & Naturalization Service, 600 F. 2d 1094 (5th Cir. 1979), the Fifth Circuit dealt with a case in which an individual had appeared pro se at a hearing of the Immigration and Naturalization Service in which she waived her statutory right to counsel provided for in 8 U.S.C. 1252(b)(2), and was thereafter found deportable. The Court found therein that the immigration judge had abused his discretion in denying her notion to reopen filed after his decision was issued and held that she

was entitled to a new hearing at which she could have the assistance of counsel. The Court stated as pertinent at 1096:

> "Although Partible was informed at the commencement of the hearing by the immigration judge of her statutory right to counsel and nevertheless elected to proceed unassisted, she waived her rights without being provided with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf and which her present counsel now presses in arguing for the reopening of her proceeding. Thus, in sum we conclude that Partible's waiver of counsel was not "competently and understandingly made", Matter Gutierrez Board of Immigration Appeals Interim Decision No. 2587, May 26, 1977; the outcome of the proceeding may have been different if counsel had been present; and that Partible is therefore entitled to a new hearing."

The MSPB has, however, through its form Appeal Form, form Initial Order, and form Order for Hearing failed to advise countless federal

employees (including Yanopoulos) of the nature of the MSPB hearing. Nor, significantly, has it advised such employees of the role counsel or another representative can play at such a hearing.

The oral hearing held by the MSPB is in fact a full scale administrative hearing at which knowledge of evidence, the ability to make evidentiary objections, and knowledge of the involved law are critical. Federal agencies appearing before the MSPB as employers are normally represented by counsel. Those few agencies which do not use counsel are represented by non-lawyers who, through practice, are very experienced in MSPB procedures and are knowledgable about the involved law. A federal employee who attempts to represent himself in an MSPB hearing has virtually no chance of success.

The MSPB misleads such individuals by not placing them on notice of the true nature of the MSPB hearing through the Appeal Form, the Initial Order, and the Order for Hearing.

As pertinent to the issues herein, the MSPB's Appeal Form does no more than advise the appealing federal employee that he can designate someone to represent him before that agency, that this representative need not be an attorney, that a hearing may be held in the case and that witnesses may be called. The Appeal Form, however, says nothing about the nature of an MSPB hearing.

The Initial Order utilized by the MSPB points out that a hearing may be held but also says nothing about the nature of an MSPB hearing. The Initial Order does provide some information concerning procedures not

relating to the hearing itself, primarily concerning discovery procedures. The Initial Order does not, contrary to the Circuit Court for the Federal Circuit's finding, "outline the Board's rules of procedure" but simply outlines certain limited rules unrelated to the nature of the hearing itself.

The Order for Hearing utilized by the MSPB sets the place and date of the hearing, provides information as to methods to obtain the presence of witnesses at the hearing, and sets dates for the filing of exhibits. It also says nothing about the nature of an MSPB hearing.

It would be a simple matter for the MSPB to advise federal employees appearing before it that the MSPB hearing is a formal adversary hearing at which witnesses will testify

pursuant to direct examination and cross examination; that evidentiary objections may be made and the Federal Rules of Evidence are in that respect used as a guide; and that it may as a result be to the advantage of that individual (although he may represent himself) to obtain a representative experienced in this type of proceeding. However, the MSPB does not advise federal employees of any of these critical matters, either in the Initial Order, the Order for Hearing, the Appeal Form, or in any other document. Without such information, the right to representation accorded by statute to federal employees appearing before the MSPB is meaningless and there can be no knowing waiver on the part of the involved federal employee of his or her right to representation. It should be kept in mind in this regard that

a great number of federal employees appear pro se at hearings before the MSPB; they are being misled just as Yanopoulos was.

If the Circuit Court of Appeals for the Federal Circuit's opinion is reviewed carefully, it soon becomes apparent that it really premises its decision as concerns the issue of notice of the nature of an MSPB hearing on its finding that it is "incredible that this petitioner would not know of the nature of an MSPB hearing", due to the length of his service as a federal employee, due to his GS-12 rating, and due to the "formality of the process used to remove him from the federal service." This unwarranted supposition, however, only serves to highlight the fact that the MSPB simply does not properly apprise federal employees of the nature of an MSPB hearing.

Petitioner, it may be noted, was

an Electronics Engineer with the Naval Sea Systems Command; not an employee of that agency's Employee Relations Division or of that agency's office of General Counsel where he would deal with MSPB procedures. It was not his job to appear at MSPB hearings or to deal with personnel matters for the agency. His job was to deal with matters of engineering. As indicated in his previously discussed Affidavit dated September 4, 1985, petitioner had no idea of how the MSPB hearing would be conducted or what procedures would be followed at the hearing until he appeared at the hearing. And there is no evidence of record to the contrary which would in any way support the Court of Appeals for the Federal Circuit's unwarranted supposition that petitioner must have known of the nature of an MSPB hearing.

The overwhelming majority of federal employees never set foot near an MSPB hearing. Being a longstanding federal employee or having a particular GS rating in no way makes one knowledgable of the nature of an MSPB hearing. Nor does the "formality of the process used to remove him from the federal service" in any way acquaint a discharged federal employee with the nature of an MSPB hearing. The process used to remove an employee from the federal service is strictly a paper process. The employee is permitted to submit affidavits to the deciding official in an effort to show why he should not be dismissed. No oral evidentiary hearing is held (in some cases, the employee may be permitted to make a type of oral argument to the deciding official). This not only does not acquaint the

employee with the nature of an MSPB hearing but, if it does anything, lulls him into believing that the MSPB hearing is similarly informal. It is thus essential that such employees be apprised of the nature of an MSPB hearing if their statutory right to a representative is to be meaningful.

Yanopoulos, like other employees before the MSPB, simply was not apprised by the MSPB, and was not on notice, of the nature of an MSPB hearing. And without being so apprised or on such notice he could not knowingly and competently waive his statutory right to representation. As such, he was and is clearly entitled to a new hearing before the MSPB at which he may have counsel present.

It should further be noted in this regard that not only did the MSPB fail to apprise Yanopoulos of the

nature of an MSPB hearing through its Appeal Form and form Orders but it in fact went so far as to frustrate Yanopoulos in any effort to obtain counsel by refusing to grant him more than a six day extension of the hearing date when he requested a one month extension of the hearing date two weeks before the then scheduled hearing date (P.A. 24-26). Thus, the instant case presents particularly compelling circumstances for reversal.

This matter of notice of the nature of an MSPB hearing is of such importance to so many affected federal employees and is of such a recurring nature as to be worthy of briefing and reasoned consideration by this Court. Federal employees are entitled to proper notice of the nature of an MSPB hearing so that they can make a knowing decision as to whether to

obtain representation or to waive their right to representation.

II. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERRED IN FAILING TO REVERSE AND REMAND THE MSPB'S FINAL ORDER IN VIEW OF PETITIONER HAVING BEEN DEPRIVED OF A FULL AND FAIR HEARING

Where a party before an administrative agency has not knowingly waived his right to representation, the reviewing Court clearly should reverse the agency's decision and remand the case for a new hearing if it finds that the party did not receive a full and fair hearing or was prejudiced by lack of counsel. Clark v. Harris, supra at 404; Floyd v. Schweiker, 550 F. Supp. 863,867 (N. D. Illinois 1982). Yanopoulos did not receive a full and fair hearing from the MSPB and was severely prejudiced at his hearing by the absence of counsel.

A federal employee appealing to the MSPB from an adverse action taken against him by his employer agency has a substantive right to a full, fair and impartial hearing before the MSPB. 5 U.S.C. 7701; 5 CFR 1201.41(a); Lockner v. Department of Transportation, 13 MSPB 45, 46 (1983). The MSPB's regulations at 5 CFR 1201.41(a) specifically require its presiding officials to "conduct fair and impartial hearings."

Yanopoulos, however, did not receive a full and fair hearing before the MSPB and was severely prejudiced by his lack of a representative insofar as counsel for the Naval Sea Systems Command was permitted, as previously shown herein, to ask extensive leading questions as to critical matters and insofar as Yanopoulos was precluded from obtaining the oral testimony of

two witnesses, Simon Kfoury and Donald Cross, whom he wished to call to the witness stand. If Yanopoulos had had counsel at the hearing, counsel would have objected to NAVSEA's leading questions and would have specifically designated witnesses (without doing so by reference to NAVSEA's list of witnesses as Yanopoulos did) in such a way that the oral testimony of Messrs. Kfoury and Cross would have been secured.

As the Court of Appeals for the Federal Circuit found below, the MPSB's Presiding Official has an obligation to assume a more active role in assisting a federal employee appearing pro se before the MSPB to the extent necessary to see to it that the pro se party receives the full and fair hearing to which he is entitled.

Petitioner, however, strongly

disagrees with the Court of Appeals' finding that this obligation was fulfilled in his case. The Presiding Official had an affirmative obligation to stop the leading questions and seriously erred when he failed to do so; it should have been completely obvious to the Presiding Official that Yanopoulos did not know that such questions on direct examination were objectionable and did not know how to object to such questions. The Presiding Official should also have permitted Yanopoulos to call Messrs. Kfoury and Cross to the witness stand, even if this required an additional day of hearing at a somewhat later date, particularly considering the intentions expressed in Yanopoulos' previously described December 7, 1982 letter to Presiding Official Marks concerning the witnesses Yanopoulos wished to have

available at the hearing (P.A. 29). By permitting counsel for NAVSEA to submit an affidavit from Mr. Cross, which of course was not subject to cross-examination and which of course was done in the manner which most favored NAVSEA's position, rather than requiring his oral testimony, the MSPB's Presiding Official grievously erred.

Under these circumstances, it is clear that the Court of Appeals for the Federal Circuit erred, by failing to find that the MSPB abused its discretion and acted arbitrarily by refusing to permit Yanopoulos to have the full and fair hearing to which he was entitled.

And the prejudice to Yanopoulos from not having counsel at the MSPB hearing only further highlights the importance of requiring the MSPB to properly apprise federal employees of

the nature of the MSPB hearing.

CONCLUSION

For the foregoing reasons, it is repectfully submitted that this petition for a writ of certiorari should be granted.

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